

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<hr/>	:	CRIMINAL ACTION
UNITED STATES OF AMERICA	:	
	:	
v.	:	
	:	
KHALIL SMITH	:	No. 15-180-1
MARK WOODS	:	No. 15-180-2
TERRANCE MUNDEN	:	No. 15-180-5
ROBERT HARTLEY	:	No. 15-180-6
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Goldberg, J.

January 20, 2017

Memorandum Opinion

The superseding indictment in this case describes an ongoing conspiracy whereby drug dealers and other victims were targeted for armed home invasion robberies. It is alleged that these crimes included the use of GPS tracking devices, police scanners, multiple firearms, and in some instances torture.

In investigating these crimes, the Bureau of Alcohol, Tobacco and Firearms (ATF) obtained out-of-court identifications through the use of what will be referred to herein as a “photo book.” This Opinion addresses several challenges to these identifications. For the following reasons, all of the challenges will be denied.

I. Background

The Defendants are charged in a multi-count superseding indictment alleging conspiracy, Hobbs Act robberies, and the use of firearms during a crime of violence.¹ The indictment describes twelve separate incidents, occurring on different dates.

¹ Specifically, Defendants Smith, Woods, Munden, and Hartley, along with twelve other co-defendants, were indicted on charges of conspiracy to interfere with interstate commerce by robbery in violation of 18 U.S.C. § 1951(a) (one count); interference with interstate commerce

Defendants Khalil Smith and Terrance Munden have moved to suppress the out-of-court identifications made by Irma Cruz, arguing that the identification process was unnecessarily suggestive. Defendants Mark Woods, Munden, and Robert Hartley have moved to suppress out-of-court identifications made by Gregory Trice, also arguing that the identification process was unnecessarily suggestive.

Regarding the Irma Cruz identification, it is alleged that on April 16, 2014, multiple masked men invaded her home, tortured her husband, forced her to strip, and stole multiple items of value. Six months later, on October 14, 2015, ATF Agents Charlene Hennessy and Charles Doerrer met with Cruz at her house to see if she could identify any of the men who had entered her home. Cruz identified Defendant Munden and partially identified Defendant Smith. (See infra, p. 5.)

Regarding the Gregory Trice identification, it is alleged that on October 18, 2013, Trice was approached and abducted by multiple men. The Government claims that the men tortured Trice and forced him to call a friend in order to lure the friend to another location where the friend was robbed. On March 31, 2015 and April 1, 2015, Agent Hennessy and Agent Doerrer met with

by robbery in violation of 18 U.S.C. § 1951(a) and 18 U.S.C. § 2 (two counts); attempted interference with interstate commerce by robbery in violation of 18 U.S.C. § 1951(a) (four counts); carjacking in violation of 18 U.S.C. § 2119 (two counts); attempted possession with intent to distribute cocaine in violation of 21 U.S.C. § 846 (one count); and using or carrying a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1) and 18 U.S.C. § 2 (seven counts). On May 26, 2016, Defendants Smith, Woods, Munden, and Hartley, along with sixteen other co-defendants, were charged in a superseding indictment with conspiracy to interfere with interstate commerce by robbery in violation of 18 U.S.C. § 1951(a) (one count); interference with interstate commerce by robbery in violation of 18 U.S.C. § 1951(a) and 18 U.S.C. § 2 (five counts); attempted interference with interstate commerce by robbery in violation of 18 U.S.C. § 1951(a) (five counts); carjacking in violation of 18 U.S.C. § 2119 (three counts); kidnapping in violation of 28 U.S.C. § 1201(a)(1) (two counts); attempted possession with intent to distribute cocaine in violation of 21 U.S.C. § 846 (one count); and using or carrying a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1) and 18 U.S.C. § 2 (thirteen counts).

Trice at the ATF office to see if he could identify any of the men who abducted him. Trice identified Defendants Woods, Munden, and Hartley, as well as three other men.

A hearing was held on December 12 and 13, 2016, wherein several witnesses testified. The Government urges that the identification procedure used with both Cruz and Trice was not unnecessarily suggestive nor was it unreliable. (Gov't Supp. Resp. at 6-14.)

I. Findings of Fact

Based on the testimony presented, I make the following findings of fact:

A. The Photo Book

- The identifications at issue were made from a “photo book.” This book contains thirty-nine individual photographs of persons ATF agents were investigating based on source information, local and state arrests, and information obtained from witnesses.
- Each photograph, also referred to as a “headshot,” was contained in a plastic sleeve with a red sticker affixed in the bottom right corner of the photo that reads “Grand Jury Exhibit.” The headshots were labeled as exhibits 1-1 through 1-39. Agent Hennessy explained that she was not sure how many headshots were in the book when it was shown to Cruz, but it was likely that there were three or four fewer than the 39 presented at the evidentiary hearings. Agent Hennessy also stated that “maybe the last two” headshots had been added to the book since her interview with Trice. Numerous miscellaneous photographs, that were not headshots, were located before exhibit 1-1. (N.T. 12/12/16, pp. 176-81, 193.)
- Agent Doerrer, with the assistance of other agents, assembled the headshots by taking photographs from the Justice Network of Pennsylvania (“JNET”), a database that houses driver’s license photographs and recent booking photographs. The book was

created as an investigative tool for the grand jury investigation, but the headshot portion was also used for eyewitness identifications. The agents tried to use the most recent photographs of the individuals for the headshots and added headshots to the book as individuals became “persons of interest.” (Id. at 66; N.T. 12/13/16, pp. 17, 37.)

- Agents Hennessy and Doerrerr did not use what is commonly referred to as a photo array with Cruz or Trice. Agent Hennessy first explained that photo arrays were not used because compiling those arrays would have been difficult or “voluminous” given the number of suspects. Agent Hennessy also stated that ATF did not have individual people identified for many of the crimes they were investigating. Agent Doerrerr elaborated, explaining that photo arrays were impractical for a large conspiracy case such as this one because the agents were investigating a series of crimes and believed that each individual suspect was tied to multiple crimes. Thus, an individual was added to the photo book not because they were suspected of participating in a particular crime, but rather because they were suspected of being part of a “larger crew” that had committed a series of crimes. (N.T. 12/12/16, pp. 255-56; N.T. 12/13/16, pp. 66, 70-72.)

The Cruz Identifications

- Agents Hennessy and Doerrerr met with Cruz at her house on October 14, 2014. Before showing Cruz the photo book, Agent Hennessy told Cruz to take her time looking through the book and that persons of interest may or may not be in the book. Cruz paged through the book one page at a time beginning with exhibit 1-1, never taking any headshot out of the book and never looking at the miscellaneous photographs in the book that came before exhibit 1-1. The agents never stopped Cruz

and never pointed at an individual headshot. Neither Agent Hennessy nor Agent Doerrerr suggested in any way that any individual pictured in the book was involved in the home invasion. (N.T. 12/12/16, pp. 174, 187.)

- Cruz stopped at exhibit 1-2 and said that Defendant Smith “looked familiar but he had a mask on his face.” Cruz then identified Defendant Munden in exhibit 1-24 as one of the men who invaded her home on April 16, 2014. She stated that Munden pulled his mask up so that she could see his face, that he was in very close proximity to her, and that he told her to be quiet. (*Id.* at 185-87.)

B. The Trice Identifications

- Agents Hennessy and Doerrerr met with Trice at the ATF office on March 31, 2015 and April 1, 2015. Trice told the agents he was walking toward his car around 11:00 p.m. on October 18, 2013 when he was approached by three men wearing police badges. The men threw Trice against a car, frisked him, and asked if there were any drugs in the apartment from which he had just come. Trice was then approached by a fourth man who placed something over his head so that he could no longer see. (Hartley Ex.1 at 1.) Trice told Agent Hennessy that he did not have a very long time to view the men before his head was covered. Beyond these facts, the hearing record was not developed regarding how long Trice looked at his assailants or the lighting conditions. (N.T. 12/12/16, p. 253.)
- Before showing Trice the photo book, Agents Hennessy and Doerrerr told Trice to take his time and that persons of interest may or may not be in the book. Trice then paged through the book one page at a time beginning with exhibit 1-1, never taking any headshot out of the book and never looking at the miscellaneous photographs in

the book that came before 1-1. The agents never stopped Trice and never pointed at an individual headshot. Neither Agent Hennessy nor Agent Doerrer suggested in any way that any individual pictured in the book was involved in his abduction. (Id. at 190-95, 98.)

- Trice identified Defendant Woods in exhibit 1-10 as someone who looked familiar and who he believed was involved in his abduction. He then identified co-Defendant Hassan Chaney in exhibit 1-12. (Id. at 194; N.T. 12/13/16, p. 14.)
- Trice identified Defendant Munden in exhibit 1-24 as one of the individuals dressed like a cop who approached him by his car on October 18, 2013. (N.T. 12/12/16, p. 195.) Trice also identified Defendant Hartley in exhibit 1-25 as someone he recognized and who may have been involved in his abduction, and then identified Charles Wardlaw in exhibit 1-26. (N.T. 12/12/16, p. 195; N.T. 12/13/16, p. 15.)
- Finally, Trice identified co-Defendant Louis Miller in exhibit 1-28 as someone he recognized from the day he was abducted.

II. Legal Standards

“The standard for admitting evidence of a pretrial identification is the same as the standard for permitting an in-court identification in the wake of a pretrial identification.” United States v. Clausen, 328 F.3d 708, 713 (3d Cir. 2003). “In both cases, the eyewitness testimony will be permitted unless . . . admitting the identification testimony would be a denial of due process.” Id. (citing United States v. Mathis, 264 F.3d 321, 330 (3d Cir. 2001)). An identification procedure violates due process when it (1) is unnecessarily suggestive, and (2) created a substantial risk of misidentification. United States v. Brownlee, 454 F.3d 131, 137 (3d Cir. 2006) (citing Manson v. Brathwaite, 432 U.S. 98, 107 (1977)). Unnecessary suggestiveness

“contains two component parts: that concerning the suggestiveness of the identification, and that concerning whether there was some good reason for the failure to resort to less suggestive procedures.” *Id.* (quoting *United States v. Stevens*, 935 F.2d 1380, 1389 (3d Cir. 1991)). “The burden to show that the suggestiveness of an identification procedure violates due process is borne by the defendant.” *United States v. Diaz*, 444 F. App’x 551, 555 (3d Cir. 2011).

An unnecessarily suggestive identification procedure does not create a substantial risk of misidentification if it “possesses sufficient aspects of reliability” given the “totality of the circumstances.” *Brownlee*, 454 F.3d at 139. Thus, even if a procedure is unnecessarily suggestive, the identification must also be unreliable to violate due process. *Id.* To determine reliability, courts consider the totality of the circumstances, looking at the following factors: (1) the opportunity of the witness to view the criminal at the time of the incident; (2) the witness’s degree of attention; (3) the accuracy of the witness’s prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. *Id.* (citing *Neil v. Biggers*, 409 U.S. 188, 199 (1972)).

III. Conclusions of Law

The identifications of Defendants Smith, Woods, Munden, and Hartley were not procured by an unnecessarily suggestive procedure. There was nothing inherently suggestive about the book itself: the headshots shown to Cruz and Trice were all the same size, each were housed in the same plastic sleeve, and all headshots, including the shots of the four Defendants, appear to be driver’s license photographs or booking photographs.

Each headshot also consistently had a red Grand Jury sticker affixed at the bottom right hand corner. It could be argued, as counsel for Defendant Smith did, that the words “Grand Jury”

suggest some type of criminal activity. However, each headshot in the photo book contained the same sticker, essentially neutralizing any head shot suggestiveness.²

There was also nothing suggestive about the way in which Agents Hennessy and Doerrer showed Cruz or Trice the photo book. The agents provided neutral instructions about how to go through the book, did not allow either witness to see the miscellaneous photographs at the front of the book, and did not point out any individual headshot or verbally suggest that any individual was involved in the home invasion or abduction. The record is also devoid of any evidence that the agents' nonverbal cues or body language in any way created any suggestiveness. I thus conclude that Defendants Smith, Woods, Munden, and Hartley have failed to establish that the identifications at issue violated their due process rights.

The second component of analyzing whether the photo book was unnecessarily suggestive is “whether there was some good reason for the failure to resort to less suggestive procedures.” The ATF agents offered two explanations as to why they used a photo book instead of a photo array for each defendant.³

² Defendant Hartley argued that the photo book was unnecessarily suggestive because his headshot (1-25) was placed in between Defendant Munden (1-24), who Trice pointed out as someone involved in his abduction, and Charles Wardlaw (1-26), who Trice knew to be involved in the abduction. Additionally, Hartley notes that co-Defendant Miller's headshot (1-28) was three pages after his headshot, and Trice had heard that Miller was involved in the abduction. Given this sequencing, Hartley argued that his headshot's proximity to the headshots of Munden, Wardlaw, and Miller was suggestive. (*Id.* at 87.) However, for this to be true, the agents would have to have known that Trice would identify Munden and Wardlaw. Both agents testified that they were not fully aware of who was suspected of participating in Trice's abduction and that photographs were not added specifically so that Trice would select them. (N.T. 12/12/16, pp. 211, 256; N.T. 12/13/16, pp. 20-21, 30-32, 70-71.) Thus, in addition to the unsuggestive process, I conclude the sequence of headshots in the book did not make the book unnecessarily suggestive.

³ Photo books are sometimes also referred to as “mug books.” The purpose of a mug book is to allow eyewitnesses to identify potential suspects. This purpose is distinct from photo spreads and lineups because photo spreads and lineups are used when the police have a suspect in mind and bring in eyewitnesses to verify the alleged culprit. The use of mug books is a common

First, the agents explained that in a large conspiracy case such as this one, photo arrays become impractical because of the volume of people and multiple incidents they are investigating. Second, the agents stated that photo arrays were impractical because they had not identified particular individuals for particular crimes, but rather a group of individuals for a series of crimes. Put another way, a photo array requires that a specific suspect be identified for a specific crime. Once that dynamic is present, the investigating agent can create a photo array with individuals who look similar to the suspect.

Given the fact that they had not identified particular individuals for particular crimes, but rather a series of crimes, and that in some instances they had not identified any individual as a suspect for a particular incident, I find that the ATF agents had a “good reason” to not use photo arrays. There was no compelling testimony or argument offered by the defense to suggest that a photo array would have been less suggestive than the photo book.

Turning next to the issue of reliability, only two facts were established at the hearing regarding the Cruz identifications. First, Cruz was not sure if Defendant Smith was at her house because his face was covered by a mask, though he “looked familiar.” N.T. 12/12/16, pp. 186-77. Second, Cruz stated that she saw Defendant Munden’s face because he pulled his mask up when he was close to her. Id. at 185.

Regarding Trice’s identifications of Defendants Woods, Munden, and Hartley, the only fact developed at the hearing was that Trice did not have a very long period of time to view his assailants. Id. at 253.

practice for law enforcement and government agencies. See Department of Justice, Procedures for Eyewitness Identification of Suspects, 7 No. 2 Crim. Prac. Guide 2 (2003). According to the ATF agents, the photo book here was somewhat different in that it contained booking photographs (mug shots) and driver’s license photographs.

I recognize that some courts, even after finding that an identification was not unnecessarily suggestive, choose to proceed to the second step of the identification inquiry involving the reliability of the initial identifications. However, because Defendants Smith, Munden, Woods, and Hartley have not met their burden in establishing that the identification procedure was unnecessarily suggestive, I need not examine the reliability of the identifications. Perry v. New Hampshire, 132 S. Ct. 716, 730 (2012) (“[T]he Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement.”); see also United States v. Foote, 2011 WL 2489904, at *3 & n.4 (3d Cir. June 23, 2011) (affirming the denial of a motion to suppress a pretrial identification without considering the reliability of the identification where the defendant failed to demonstrate the photographic array was unnecessarily suggestive); Mathis, 264 F.3d at 331 (affirming the denial of a motion to exclude identification testimony based only on the defendant's failure to show the photographic identification was unnecessarily suggestive without addressing the reliability of the identification).

For all of the reasons set forth above, Defendants’ motions are denied.

An appropriate order follows.

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ORDER

AND NOW, this 20th day of January, 2017, upon consideration of Defendant Smith's oral motion to suppress, Defendant Woods's oral motion to suppress, Defendant Munden's motion to suppress (doc. no. 559), Defendant Hartley's motion to suppress (doc. no. 558), the Government's responses, and following an evidentiary hearing and oral argument, and for the reasons set forth in the Court's Memorandum Opinion, it is hereby **ORDERED** that Defendants Smith, Woods, Munden, and Hartley's motions are **DENIED**.

BY THE COURT:

S/Mitchell S. Goldberg
Mitchell S. Goldberg, J.